



PROPOSED RULE MAKING

CR-102 (June 2004)

(Implements RCW 34.05.320)

Do NOT use for expedited rule making

Agency: Employment Security Department

- ☒ Preproposal Statement of Inquiry was filed as WSR 09-16-011 ; or
☐ Expedited Rule Making--Proposed notice was filed as WSR ; or
☐ Proposal is exempt under RCW 34.05.310(4).

- ☒ Original Notice
☐ Supplemental Notice to WSR
☐ Continuance of WSR

Title of rule and other identifying information: (Describe Subject) WAC 192-320-035, How are unemployment insurance tax rates determined for employers who are delinquent on taxes?

Hearing location(s): Employment Security Department
Maple Leaf Conference Room, 2nd Floor
212 Maple Park
Olympia, Washington

Date: November 10, 2009 Time: 10:30 a.m.

Submit written comments to:

Name: Pamela Ames
Address: PO Box 9046
Olympia, WA 98507-9046
e-mail pames@esd.wa.gov
fax (360)902-9799 by (date) November 10, 2009

Assistance for persons with disabilities: Contact

Jeannette Nelson by November 9, 2009
TTY (360) 902-9569 or (360) 902-9602

Date of intended adoption: November 16, 2009
(Note: This is NOT the effective date)

Purpose of the proposal and its anticipated effects, including any changes in existing rules: The proposed amendments implement House Bill 1338 (Ch. 83, Laws of 2009). The new law broadens the ability of the Commissioner of the Employment Security Department to waive application of the higher tax rate for delinquent taxpayers if the employer acted in good faith and application of the higher tax rate would be inequitable.

Reasons supporting proposal: The rule provides standards for the Commissioner to apply in determining whether to waive the higher tax rate for delinquent employers.

Statutory authority for adoption: RCW 50.12.010, 50.12.040, 50.29.010

Statute being implemented: RCW 50.29.010

Is rule necessary because of a:

Federal Law?

☐ Yes ☒ No

Federal Court Decision?

☐ Yes ☒ No

State Court Decision?

☐ Yes ☒ No

If yes, CITATION:

DATE

10-5-09

NAME (type or print)

SIGNATURE

TITLE

Paul Trause
Deputy Commissioner

CODE REVISER USE ONLYCODE REVISER USE ONLY
STATUTE BOOK

OCT 7 2009

TIME 9:07
DATE 09-20-096

(COMPLETE REVERSE SIDE)

☒ Agency comments or recommendations, if any, as to statutory language, implementation, enforcement, and fiscal matters:
None.

Name of proponent: (person or organization) Employment Security Department

☐ Private
☐ Public
☒ Governmental

Name of agency personnel responsible for:

Name	Office Location	Phone
Drafting..... Art Wang	212 Maple Park, Olympia	(360) 902-9587
Implementation.... Nan Thomas	212 Maple Park, Olympia	(360) 902-9303
Enforcement..... Nan Thomas	212 Maple Park, Olympia	(360) 902-9303

Has a small business economic impact statement been prepared under chapter 19.85 RCW?

☐ Yes. Attach copy of small business economic impact statement.

A copy of the statement may be obtained by contacting:

Name:

Address:

phone () _____

fax () _____

e-mail _____

☒ No. Explain why no statement was prepared.

The proposed rule will not impose more than minor costs on businesses, nor will there be a disproportionate impact on small business. Any business costs associated with the rule are the result of the underlying legislation.

Is a cost-benefit analysis required under RCW 34.05.328?

☒ Yes A preliminary cost-benefit analysis may be obtained by contacting:

Name: Juanita Myers

Address: Employment Security Department

PO Box 9046

Olympia, WA 98507-9046

phone (360) 902-9665

fax (360) 902-9799

e-mail jmyers@esd.wa.gov

☐ No: Please explain:

AMENDATORY SECTION (Amending WSR 07-23-127, filed 11/21/07, effective 1/1/08)

WAC 192-320-035

How are unemployment insurance tax rates determined for employers who are delinquent on taxes or reports?

(1) An employer that has not submitted by September 30 all reports, taxes, interest, and penalties required under Title 50 RCW for the period preceding July 1 of any year is not a "qualified employer."

(2) For purposes of this section, the department will disregard unpaid taxes, interest, and penalties if they constitute less than either one hundred dollars or one-half of one percent of the employer's total tax reported for the twelve-month period immediately preceding July 1. These minimum amounts only apply to taxes, interest, and penalties, not to failure to submit required reports.

(3)(a) This section does not apply ((to services under RCW 50.04.160 performed in domestic service in a private home, local college club, or local chapter of a college fraternity or sorority)) if the otherwise qualified ((domestic)) employer shows to the satisfaction of the commissioner that he or she acted in good faith and that application of the rate for delinquent taxes would be inequitable. This exception is to be narrowly construed to apply at the sole discretion of the commissioner, recognizing that the delinquent tax rate only applies after the employer has already received a grace period of not less than two months beyond the normal due date for reports and taxes due. The commissioner's decision shall be subject to review only under the arbitrary and capricious standard and shall be reversed only for manifest injustice based on clear and convincing evidence.

(b) Except for services under RCW 50.04.160 performed in domestic service in a private home, local college club, or local chapter of a college fraternity or sorority, the commissioner will not find that application of the rate for delinquent taxes would be inequitable:

(i) If the employer has been late with filing or with payment in more than one of the last eight consecutive quarters immediately preceding the applicable period;

(ii) If the delinquency was due to absences of key personnel and the absences were because of business trips, vacations, personnel turnover, or terminations;

(iii) If the delinquency was due to adjusting by more than two quarters the liable date when the employer first had employees; or

(iv) If the employer is a successor, the rate for delinquent taxes is based on the predecessor, and the successor could or should have determined the predecessor's tax status at the time of the transfer.

(c) Examples of when the commissioner may find that application of the rate for delinquent taxes would be inequitable include if the delinquency results from:

(i) An employer reducing its tax payment by the amount specified as a credit on the most recent account statement from the department, when the credit amount is later determined to be inaccurate;

(ii) Taxes due which are determined as the result of a voluntary audit;

(iii) Resolution of a pending appeal and any amounts due are paid within thirty days of the final resolution of the amount due;

(iv) The serious illness or death of key personnel or their family that extends throughout the period in which the tax could have been paid prior to September 30 and no reasonable alternative personnel were available and any amounts due are paid no later than December 31 of such year; or

(v) An employee or other contracted person committing fraud, embezzlement, theft, or conversion, the employer could not immediately detect or prevent the wrongful act, the employer had reasonable safeguards or internal controls in place, the employer filed a police report, and any amounts due are paid within thirty days of when the employer could reasonably have discovered the illegal act.

(d) When determining whether an employer acted in good faith and that application of the rate for delinquent taxes would be inequitable, the following factors are considered neutral and neither support nor preclude waiver of the rate for delinquent taxes:

(i) The harshness of the burden on the employer caused by application of the rate for delinquent taxes;

(ii) Lack of knowledge by the employer, bookkeepers, accountants, or other financial advisors about application of the law or the potential harshness of the rate;

(iii) Delay by the employer or its representative in opening mail or receiving other notice from the department; or

(iv) Error by a payroll, bookkeeping, or accounting service on behalf of an employer.

(4) The department shall provide notice to the employer or employer's agent that ~~((he or she))~~ the employer may be subject to the higher rate for delinquent taxes if the employer does not comply with this section. Notice may be in the form of an insert or statement in July, August, or September billing statements or in a letter or notice of assessment. Evidence of the routine practice of the department in mailing notice in billing statements or in a notice of assessment shall be sufficient to establish that the department provided this notice. No notice need be provided to an employer that is not currently registered and active.

(5) An employer that is not a "qualified employer" because of failure to pay contributions when due shall be assigned an array calculation factor rate two-tenths higher than that in rate class 40, unless the department approves a deferred payment contract with the employer by September 30 of the previous rate year. If an employer with an approved deferred payment contract fails to make any one of the payments or fails to submit any tax report and payment in a timely manner, the employer's tax rate shall immediately revert to an array calculation factor rate two-tenths higher than in rate class 40.

(6) An employer that is not a "qualified employer" because of failure to pay contributions when due shall be assigned a social cost factor rate in rate class 40.

(7) Assignment of the rate for delinquent taxes is not considered a penalty which is subject to waiver under WAC 192-310-030.

(8) The amendments to this section effective July 26, 2009, apply only to tax rates assigned after that date.